No. 90-1624

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DANIEL-MARC AUGER, CHANTAL-MARISE AUGER, all minors, by their father, next friend and natural guardian, RAYMOND AUGER,

Petitioners,

vs.

ANTOINETTE TENEYCK, individually; STEVEN TENEYCK, individually; DR. JANET BERSON, individually; KENNETH S. DOMZALSKI, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; BRIAN GUEST, individually and as an employee of the law firm of Bookbinder,

(Continued)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ANTOINETTE TENEYCK, STEVEN TENEYCK, KENNETH S. DOMZALSKI AND BRIAN GUEST

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Guest and Domzalski; LU-ANN WATSON and PAUL SNYDER, individually and as employees of the law firm of Marshall, Dennebey, Warner, Coleman and Goggin; DR. JULIAN FREEMAN, individually; JUDGE JAMES A. YOCUM, Municipal Court Judge of Moorestown, New Jersey; JUDGE CORNELIUS SULLIVAN, JUDGE MARTIN HAINES, JUDGE ANTHONY TUNNEY, JUDGE DOMINICK FERRELLI, JUDGE MYRON GOTTLIEB, JUDGE VICTOR FRIEDMAN, Individually and as Superior Court Judges of New Jersey; JUDGE MICHAEL KING, JUDGE WARREN BRODY, JUDGE JULIO ASHBEY, JUDGE JAMES H. COLEMAN, JUDGE WILLIAM M. D'ANNUNZIO, JUDGE ROBERT MUIR, individually and as judges of New Jersey Appellate Court; CHIEF JUSTICE ROBERT WILENTZ, individually and as Judge of the Supreme Court of New Jersey,

Respondents.

QUESTIONS PRESENTED

1. Is the petition for writ of certiorari procedurally correct as to respondents, Antoinette TenEyck, Steven TenEyck, Kenneth S. Domzalski and Brian Guest?

2. If petitioner's writ is procedurally correct, then is the Third Circuit's affirmance of the district court opinion reversible error?

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ANTOINETTE TENEYCK, STEVEN TENEYCK, KENNETH S. DOMZALSKI AND BRIAN GUEST

OPINIONS BELOW

1. Opinion of the United States Court of Appeals for the Third Circuit (unpublished), rendered November 26, 1990. (*See* Appendix A to Petition for Writ of Certiorari.)

2. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.C.J. (unpublished), rendered April 6, 1990. (*See* Appendix B to Petition for Writ of Certiorari.)

3. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.C.J. (unpublished), rendered June 28, 1990. (*See* Appendix A to Brief in Opposition of Respondent, Dr. Janet Berson, at 1ra.)

STATEMENT OF JURISDICTION

The issue of jurisdiction as to this petition is discussed in Point I, *infra*, and the Court is respectfully directed to respondent's argument therein.

COUNTER-STATEMENT OF THE CASE

Petitioner Raymond Auger's complaint, alleging violation of his civil rights and purporting to set forth a cause of action under 42 U.S.C. § 1983; 42 U.S.C. § 1985; and 42 U.S.C. § 1986, was filed on July 17, 1989. Subsequent thereto, an amendment was filed on July 27, 1989. The complaint's genesis is found in a matrimonial dispute between petitioner and his former wife Antoinette TenEyck which occurred in 1982. The dispute was the subject of numerous proceedings in the State of New Jersey: in particular, the Superior Court of New Jersey, Chancery and Law Division; the Superior Court of New Jersey, Appellate Division; and the Supreme Court of the State of New Jersey. According to the record below all state court proceedings were decided adversely to petitioner, Auger, evidently prompting his decision to seek recourse in the United States District Court for the District of New Jersey.

In the United States District Court for the District of New Jersey, the petitioner sought redress against 22 defendants, including the following:

> Antoinette TenEyck, his former wife; Steven TenEyck, his former wife's new husband; Kenneth S. Domzalski and Brian Guest, attorneys for the TenEycks; Paul Snyder and Lu-Ann Watson; counsel for Dr. Berson in the state court proceedings; Dr. Julian Freeman, an orthodontist; the Honorable James Yocum, a municipal court judge; 13 members of the New Jersey state judiciary, including the Chief Justice; and, Dr. Janet Berson, a court appointed psychologist.

The theories as to all defendants relate to their participation in the state court proceedings, *i.e.* that their participation in these proceedings violated his civil rights.

By way of procedural history, during the initial 45-days following the filing and service of the complaint in the district court, various motions were filed including: 1) a motion by the petitioner, Raymond Auger, for default and default judgment; 2) a motion by Dr. Berson to file a responsive pleading out of time; 3) and motions by other defendants to dismiss the complaint against them for failure to state a claim for relief.

All pending motions came before the United States District Court on April 6, 1990, when the Honorable John C. Lifland, U.S.C.J. entered a memorandum and order dismissing the complaint as to all the defendants who have sought such relief. As to the remaining defendant, Dr. Berson, Judge Lifland allowed the filing of a responsive pleading by April 15, 1990. He also denied the petitioner's motion to enter default judgment. A copy of this opinion is attached as Appendix B-1 to the petition for writ of certiorari.

Dissatisfied with disposition by the district court, petitioner filed a notice of appeal to the United States Supreme Court (sic) of the order of Judge Lifland on May 7, 1990. (*See* Appendix of respondent, Berson, at 4ra.) Although originally directed to this Court, this notice was accepted and filed by the United States Court of Appeals for the Third Circuit. Subsequent to the filing of petitioner's notice of appeal, respondent, Berson, filed her notice of motion for summary judgment. On June 28, 1990, after considering opposition filed by the petitioner, Judge Lifland granted Dr. Berson's motion and dismissed petitioner's cause of action in a separate memorandum and order of June 28, 1990. (See appendix of respondent, Berson, at 1ra.)

It is the position of these respondents that the within petition is procedurally improper. While petitioner attacks the substantive dismissal of the complaint against various defendants (petitioner does not challenge the dismissals of the action against Dr. Julian Freeman, Brian Guest, Lu-Ann Watson, and Paul Snyder), no appeal was filed subsequent to the June 28, 1990 order dismissing Dr. Janet Berson from the case. The order from which petitioner gave notice of appeal was the first memorandum and order of Judge Lifland issued April 6, 1990, which notice of appeal was filed May 7, 1990. At that time, Dr. Berson was still in the case and the order was not a final order as to all issues and all defendants. Thus, any appeal would necessarily be interlocutory.

Interlocutory appeals require written certifications of the interlocutory questions by the trial judge. As is evidenced by 28 U.S.C. § 1292(b), discussed in Point I, *infra*, this certification is a prerequisite for appellate jurisdiction. No such certification was ever given in this case.

On November 26, 1990, the United States Court of Appeals for the Third Circuit issued its decision affirming the United States District Court for the District of New Jersey. A petition for

rehearing *en banc* was denied by the United States Court of Appeals for the Third Circuit on January 25, 1991. Whereupon, Raymond Auger, through his present counsel, filed his petition for a writ of certiorari to this judicial body.

For the reasons discussed hereafter, respondents most respectfully submit that the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS PROCEDURALLY DEFICIENT AS TO RESPONDENTS AND SHOULD BE DENIED.

Petitioner invokes the jurisdiction of this Court in reliance upon 28 U.S.C. § 1254(1). This statue provides as follows:

> § 1254. Courts of Appeals; certiorari, certified questions.
>
> Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are

> desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Petitions for writ of certiorari are governed by United States Supreme Court Rule 10, which provides as follows:

> Rule 10. Considerations Governing Review on Writ of Certiorari.
>
> 1. A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

> (c) When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.
>
> 2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

As will be demonstrated, the within petition fails to pass muster under the above statute and rule and accordingly should be denied.

In order to more fully understand the chronology of events in this case a simple statement of the concluding events is helpful:

A. April 6, 1990,
Honorable John C. Lifland, U.S.C.J. issued first opinion granting summary judgment as to remaining defendants and allowing respondent Berson to file answer by April 15, 1990.

B. April 16, 1990,
Respondent, Berson, complied with order and filed answer.

C. May 7, 1990,
Petitioner filed notice of appeal which was accepted by the United States Court of Appeals for Third Circuit as to April 6, 1990 order of Honorable John C. Lifland.

D. May 22, 1990,
Respondent, Berson, moved for summary judgment as to the plaintiff's complaint against her.

E. June 26, 1990,
Honorable John C. Lifland, U.S.D.J. entered second order granting summary judgment as to respondent, Berson.

As is plainly evident from the above list, petitioner's notice for leave to appeal was filed more than 6 weeks prior to the date when the United States District Court for the District of New Jersey dismissed the final defendant from the action. As petitioner's notice of appeal illustrates, petitioner sought review of the April 6, 1990 district court opinion of the Honorable John C. Lifland, U.S.D.J. while the case had not been resolved as to all issues and all parties. This is clearly an interlocutory situation which requires certification by the trial court. The United States Court of Appeals for the Third Circuit received the case in this posture and, that remains the posture of the case before this Court with the addition that none of the requirements for a grant of a writ have been met.

This Court should not assert jurisdiction to determine this case. Since the April 6th memorandum and order of Judge Lifland did not resolve all issues as to all parties, the appeal must be deemed to be interlocutory. Interlocutory appeals are governed by 28 U.S.C. § 1292 which provides as follows:

> § 1292. Interlocutory decisions
>
> (a) Except as provided in subsection (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court; . . .
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten (10) days after the entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Paragraph (b) of the above rule clearly indicates that a trial judge must certify the question before an interlocutory appeal is allowed. Numerous opinions also hold that without such certification there is no appellate jurisdiction. *See e.g., Barfield v. Weinberger*, 485 F.2d 696 (5th Cir. 1973). In the present case, the trial judge did not certify any interlocutory question and no appeal from the final order was taken, therefore no appellate review is available. Petitioner fails to address this issue and instead

turns directly to an examination of the allegations against the respondents. This practice is erroneous under the cited law and mandates a denial of the petition.

In summary, the petition for writ of certiorari should be denied because no appeal has been filed from the final determination of this matter and because the order from which petitioner has appealed is an uncertified interlocutory order for which there exists no appellate jurisdiction.

II.

THE PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED ON SUBSTANTIVE GROUNDS AS WELL.

Even if this Court were to address petitioner's argument on a substantive basis, the petition should be denied. The crux of petitioner's argument is that the district court failed to give proper treatment to the *pro se* complaint. In particular, petitioner suggests that the district court failed to consider the conspiracy argument under 42 U.S.C. § 1985 and 42 U.S.C. § 1986. A review of the opinions below shows that this is patently untrue.

When looking at petitioner's complaint as to the respondent, the Court will find only conclusory statements which at their core represent a claim that mere participation as attorneys, witnesses, and litigants in state court proceedings is sufficient to constitute state action under the Civil Rights Act. These conclusory statements fail to show a cause of action under 42 U.S.C. § 1983, § 1985 or § 1986.

The district court correctly held and the Third Circuit correctly affirmed, the determination of no cause of action as to respondents that their mere participation in state court proceedings does not constitute state action. The opinion of the Honorable John C.

Lifland, U.S.D.J. indulgently characterized petitioner's complaint under 42 U.S.C. § 1983. The District Court's treatment of the complaint was more than just.

Upon evaluating respondent's motion for summary judgment, the court opined that respondents, Antoinette TenEyck, Steven TenEyck, Kenneth S. Domzalski, and Brian Guest were not a "state actors" for the purpose of 42 U.S.C. § 1983. The court correctly cited to the prior decisions in *Hall v. Quillen*, 63 F.2d 1154 (4th Cir. 1980) and *Anderson v. Glismann*, 577 F. Supp. 1506 (D. Col. 1984). Petitioner produced no evidence to substantiate an inference that any court or other state official influenced or "conspired" with any of the respondents.

Notwithstanding the palpable lack of substance in petitioner's complaint, the detail of Judge Lifland's memorandum and order demonstrates the careful consideration and granting of favorable inferences to petitioner that the Court gave before rendering its decision. It is obvious that the district court gave all favorable inferences to the petitioner.

It is respectfully submitted that the decision of the United States District Court for the District of New Jersey dismissing the complaint as to respondents, Mr. & Mrs. TenEyck, Mr. Domzalski, and Mr. Guest was proper and appropriate. Even under the liberal construction of pleadings under Federal Rule of Civil Procedure 8(b), the petitioner's complaint failed to pass muster. Moreover, the United States Court of Appeals for the Third Circuit Court appropriately affirmed the decision. Hence, the petition for writ of certiorari should be denied.

Finally, there are no substantial federal questions raised in this petition, no state action to deny civil rights, and no other facts that would provide a basis for a grant of the writ of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari is procedurally improper and substantively unsupported by the facts. Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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